



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL CASE NO. 1 OF 2014

BEMUTA AGENCIES LIMITED.....APPELLANT

VERSUS

JATOMY ENTERPRISES LIMITED

GEOFFREY GATHURESPONDENTS

RULING

This is an appeal against the ruling of the court of the acting Principal Magistrate in Embu dated 20th November, 2013 in which that court dismissed a preliminary objection of the appellant. The appellant who was the 1st defendant in the lower court had taken the view that that court was not seized with jurisdiction to try the issues in dispute in the suit which is still pending in that court. The appellant has set out four grounds of appeal in his memorandum of appeal to this court. I will consider each of the grounds separately.

In the 1st ground of appeal, he has stated that the court erred in law and fact by failing to consider the material placed before it in the form of written statement of defence, witness statements and the accompanying bundle of documents. As a result, it is stated that the court was unable to determine the real cause of action in the matter.

I have perused the ruling appealed against and it is clear from that ruling that the issue raised in that court was one of jurisdiction. It is based on section 15 of the Civil Procedure Act. According to that ruling, the court found after perusing the plaint and the defence that the cause of action was based on an alleged breach of contract which was made in Mombasa and was expected to be completed in Embu town. According to the court, the issue as to whether the accident occurred in Makindu which involved motor vehicle registration No. KBB 305X was not an issue that that court was called upon to determine. In the circumstances, I find that the court below clearly found that the real issue between the parties before it was based on contract and not the alleged accident. It therefore follows that this ground of appeal fails and it is hereby dismissed.

In ground No. 2, the appellant has stated that the court erred in law and fact by basing its decision solely on the plaintiff's pleadings and deliberately ignored the appellant's submissions concerning the jurisdiction of that court. In this regard, it is clear from the ruling of the court that the issue of jurisdiction was fully considered after it had been raised and canvassed by the parties. The court stated in that respect as follows:

“The question for determination is whether the cause of action here is as a result of a road traffic accident or it is as a result of breach of contract.”

It is my view from perusal of the plaint and the defence, that the cause of action is clearly an alleged breach of contract. The contract was made in Mombasa and expected to be completed in Embu. That an accident occurred in Makindu involving motor vehicle registration number KBB 305X is not an issue that the court will be called upon to determine one way or the other. That, to my mind is merely a fact which when properly proved will make the real question is the contract between the plaintiff and the defendants and whether it was finally discharged as was anticipated by the parties under explanation (3) (11) of the section 15 of the Civil Procedure Act, this court has jurisdiction to hear and determine this suit. Having so found, I now proceed to dismiss the defendants preliminary objection with costs to the plaintiff”

It is clear from this paragraph that the court below properly considered this issue and found that it had jurisdiction to entertain the suit.

In ground No. 3, the appellant has stated that the court erred in law by failing to consider that the appellant was a Limited Liability Company located in Nairobi and that it carries on the business of general merchandise. And in view of **section 15 (a) of the Civil Procedure Act**, the suit should have been filed in Nairobi. The bundles that were part of the pleadings clearly show that the appellant was hired to transport the goods of the plaintiff to Embu town. And since the claim is based on contract which was to be completed in Embu town, the court properly found that it had jurisdiction to entertain the suit in terms of **section 15 of the Civil Procedure Act in particular explanation (3)** of that section.

In the light of the provisions of **section 15 (a) and explanation (3)** it is clear that the court properly concluded that it had jurisdiction to entertain the suit.

Finally, in ground No. 4, the appellant has stated that the court erred in law by failing to apply the overriding objective as stated in **section 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution**. I have considered this ground of appeal and I find that it is implicit in the ruling of the court below that it was fully considered and rejected. The overriding principle in civil proceedings is that suits should be heard on their merits and where an issue of jurisdiction is raised, it has to be considered first because it goes to the root of the whole case. In the circumstances, I find that this ground of appeal also fails and is hereby dismissed.

This is the first appeal court. According to **Selle v. Associated Motor Boat Co Ltd (1968) EA 123**, I am required to reassess the material placed before the trial court and proceed to make my own independent assessment and conclusions. I have done so. I find in this case that evidence had not been tendered because the case had not gone to full hearing. Having reassessed the material placed before the court below, I have come to the same conclusion that the trial court had jurisdiction to entertain the suit.

The upshot of this is that the appellant's appeal is dismissed with costs to the respondent both in this court and in the trial court.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this..8th .. day of **OCTOBER, .2015**

In the presence of Mr Kathungu for the respondents and in the absence of counsel for the appellant.

Court clerk R. Njue

J.M. BWONWONGA

JUDGE

08.10.15